Copyright and Fair Use for Government Purposes

April 6, 2009

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COPYRIGHT AND FAIR USE

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DTIC 2009

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What is Protected: Section 102(a)

§ 102. Subject matter of copyright: In general

a)Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

Works of authorship include the following

Subject matter of Copyright Section 102(a) continued:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works;
- (7) sound recordings; and
- (8) architectural works.

Copyright Formalities and Duration

- As of 1989 when the US joined Berne, notice is no longer required for Federal copyright protection, e.g., © 1999 John Doe.

- Registration is not required for protection; but for US authors, registration is required for enforcement of rights.

- Unless information reveals otherwise, all works published since 1923 must be assumed to be protected by copyright.

What is not protected Section 102(b)

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

What is not protected Section 105 U.S. Government Works

Copyright protection under this title is not available for any work of the United States Government, *but*

the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest or otherwise.

- This provision does not affect works by the States or works by foreign governments.
- U.S. Government may claim copyright in works abroad.

The Bundle of Rights: Section 106

§ 106. Exclusive rights in copyrighted works

Subject to sections 107 through 121, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

Section 106 Continued

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

What is not protected
Works in the Public Domain

- Works whose copyright term has expired
- Works that that are not copyrightable
- Works that lost protection through some failure of compliance with a formality.
  - e.g., Lack of Copyright Notice on pre-Berne or 1909 Act works
  - (except for works by foreign authors whose works were injected into the public domain. Such foreign works still under protection in the country of origin were automatically restored to protection in the US.)

International Copyright

- **Berne** is the primary international copyright treaty
  - States general principles and leaves the implementation of these principles to the national treatment by members in the context of the respective systems
  - Provides for reciprocity among members
  - The treaty is not enforceable, only the particular laws of individual countries
  - Berne compliance was largely without teeth

International Copyright Restoration

- In 1994, pursuant to the **GATT**, Congress enacted section 104A
- Restores copyrights in the US to the works of foreign authors who lost protection in the US due to a failure to meet formalities of the US copyright law
- Restoration was required by our accession to Berne

International Copyright

- **TRIPS** (Trade Related Aspects of Intellectual Property) Agreement
  - Builds on Berne principles
  - Provides a compliance mechanism in the form of a dispute process within the World Trade Organization (WTO)
  - If a provision of the agreement is not implemented or is violated, a party may bring a dispute before a WTO panel
  - Panel may assess remedies

International Copyright

- Copyrighted works may fall under domestic or foreign copyright laws
- Foreign copyright laws contain many differences from US law, e.g.,
  - Fair use does not exist in most foreign countries
  - Government works may be subject to copyright under the laws of foreign countries
- It's very difficult to establish the copyright status of foreign works; such determinations must be performed on a case-by-case, work-by-work basis

Key Questions

- Is what I want to use protected? If so, under what law? U.S. law? Foreign law?
- Do I want to exercise one of the copyright owner's exclusive rights?
- Is there an exemption or privilege in Sections 107 - 122 that allows use of the work in this particular situation?
- If a foreign work, what rights and exceptions apply?

Section 107 - the preamble

- Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section,

- for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright

- In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include-

The Factors

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

- (2) the nature of the copyrighted work;

- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

The Factors - continued

- (4) the effect of the use upon the potential market for or value of the copyrighted work.

- The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

First Sale Doctrine
17 U.S.C. §109

The owner of a particular copy or phonorecord that was lawfully made is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.

§ 110 Limitations on exclusive rights Exemption of certain performances and displays

Notwithstanding the provisions of section 106, the following are not infringements of copyright:

- § 110(1) performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audiovisual work, the performance, or the display of individual images, is given by means of a copy that was not lawfully made under this title, and that the person responsible for the performance knew or had reason to believe was not lawfully made;

Government Uses

- **There is no general exemption for government use**
- Government use of copyrighted works are guided by the same analyses as uses by other entities
- The purpose (e.g., importance or necessity) of the government use may affect the analysis
- In compelling situations, the unique nature of the government may be a factor in the analysis

Government Uses

- Recognize when to seek legal counsel for uses of works
- Obtain relevant facts, including whether alternative works would fulfill the purpose
- If use of a particular work is necessary for a governmental purpose, find ways to avoid unnecessary harm to the copyrighted work’s market
- Make it clear that a work may be or is subject to copyright protection so that the public is clear that the work is not a government work

Non-statutory considerations

- Best practices for fair use
- Permission and licenses
- Replacement of copyrighted works with available substitutes
- Alternative methods of achieving the same result
- Avoid copying materials created for the government (e.g., primary market)

Additional Questions?

- Rented DVDs?
- Purchased material?
- Use of ideas?
- Create original material?
- Use links?
- New resources, like CC licensed material, Flickr, Getty and Corbis archives, etc.

http://www.copyright.gov

United States Copyright Office
The Library *of* Congress

Points of Contact

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